

#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure & Suites
Los Angeles, California

Panel Presentation

WAGE & HOUR LAW

FLSA BASICS: EXEMPTIONS GALORE & MUCH, MUCH MORE!

ISSUE SPOTTING FLSA VIOLATIONS

Todd Jackson
Feinberg Jackson Worthman
& Wasow LLP
383 4th Street, Suite 201
Oakland, CA 94607
(510) 269-7998
todd@feinbergjackson.com

Troy L. Kessler
Shulman Kessler LLP
534 Broadhollow Road
Suite 275
Melville, NY 11747
(631) 499-9100
tkessler@shulmankessler.com

Jahan Sagafi
Outten & Golden, LLP
One Embarcadero Center
38th Floor
San Francisco, CA 94111
(415) 638-8800
jsagafi@outtengolden.com

I. WAGE AND HOUR ISSUE SPOTTING - THE PROFESSIONAL, EXECUTIVE AND ADMINISTRATIVE EXEMPTIONS TO THE FLSA

A. Keys to Keep in Mind when Assessing whether an Exemption Applies

1. The FLSA is a remedial statute, and as such, exemptions are to be narrowly construed. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *see also Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) (reversing district court's judgment to dismiss claim); *but see Chen v. Major League Baseball Properties, Inc.*, 798 F.3d 72, 83 (2d Cir. 2015) (affirmed district court's holding to dismiss for failure to state claim).
2. In order to be exempt, an employee's actual job duties must fall squarely within the four corners of the particular exemption. *See, e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). There is a combination exemption for employees who perform duties that fall under more than one exemption. *See* 29 C.F.R. § 541.708.

3. The employer bears the burden of pleading and proving that the employee fits “plainly and unmistakably” within the terms of the exemption. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 (2012) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1156–57 (10th Cir. 2012); *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 204 (2d Cir. 2009) (“The employer has the burden of proving that the employee clearly falls within the terms of the exemption.”); *Meza v. Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 581 (5th Cir. 2013).
4. Exemptions are based upon the salary and actual job duties of the employee, not on the job title. *See* 29 C.F.R. § 541.2.

B. Common Terms

1. Primary duties - “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a).
 - a. Determination based on totality of circumstances. *See Id.*
 - b. Factors include:
 - (i) The relative importance of the exempt vs. non-exempt job duties;
 - (ii) The amount of time performing exempt work;
 - (iii) The amount or type of supervision to which an employee is subjected; and
 - (iv) The relationship between the employee’s salary and the wages paid to other co-workers for the kind of non-exempt work performed by the employee. 29 C.F.R. § 541.700(b).
2. Directly and Closely Related - Exempt work is generally work that is “directly and closely” related to exempt work. 29 C.F.R. § 541.703(a).

C. Salary Basis Test

1. Salary over \$455 per week. 29 C.F.R. § 541.600(a).
2. Requires that exempt white-collar employees regularly receive a predetermined salary on at least a weekly basis. 29 C.F.R. § 541.602(a).
3. In order to be exempt, a white-collar employee must “receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.” *Id.*

4. Except when specifically permitted by regulations, the salary basis test is violated if the employer makes deductions from the predetermined amount to be paid to the employee.
5. Permissible deductions from salaries include:
 - a. Employee absences of one day or more. 29 C.F.R. § 541.602(b)(1).
 - b. Violations of safety rules of “major significance.” 29 C.F.R. § 541.602(a)(4).
 - c. Disciplinary suspensions for violations of work rules. 29 C.F.R. § 541.602(b)(5).
6. Impermissible deductions include:
 - a. Absences caused by the employer. 29 C.F.R. § 541.602(a).
 - b. Absences due to jury duty or caused by need to appear as a witness. *Id.*
 - c. Partial day absences. *Id.*
 - d. Effect of improper deductions may cause the employer to lose the exemption. *See* 29 C.F.R. § 541.603(a). However, be aware of “safe harbor” corrections provisions. 29 C.F.R. § 541.603(d).

II. PROFESSIONAL EXEMPTION

A. Elements

1. Employee must be paid on a salary basis or fee basis of at least \$455 per week; and
2. Employee’s *primary duty* must be the performance of work:
 - a. *Requiring* advanced knowledge in a field of science or learning customarily acquired by a *prolonged course of specialized intellectual instruction*,” 29 C.F.R. § 541.301(a), or
 - b. *Requiring* invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300(a) (emphasis added).

B. Learned Professionals

1. Work must require advanced knowledge. 29 C.F.R. § 541.301(a)(1).

- a. “Although [an employee] may have an advanced education, that inquiry is not determinative. The proper focus is on *whether the particular position at issue necessitated* such advanced knowledge.” *Debejian v. Atl. Testing Labs., Ltd.*, 64 F. Supp. 2d 85, 88-89 (N.D.N.Y. 1999) (emphasis added); *Solis v. Washington*, 656 F.3d 1079, 1081 (9th Cir. 2011) (holding that exemption did not apply because employees acquired advanced knowledge from general academic education and not from prolonged course of specialized study); *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737, 747 (6th Cir. 2000) (“The mere fact that an employee must obtain some education or training to perform a technical job does not exempt him from the provisions of the FLSA”); *Dybach v. State of Fla. Dep’t of Corrections*, 942 F.2d 1562, 1564 (11th Cir. 1991) (“[T]he determinative factor is the job requirement and not the education in fact acquired by the employee”);
- b. Must be work that is “predominantly intellectual in character”;
- c. Must be work that requires “the consistent exercise of discretion and judgment,” 29 C.F.R. § 541.301(b); *See, e.g., De Jesus-Rentas v. Baxter Pharmacy Servs. Corp.*, 400 F.3d 72, 75 (1st Cir. 2005) (holding that pharmacists consistently exercise discretion and judgment);
- d. Must use advanced knowledge to analyze, interpret, or make deductions from various facts and circumstances. *Id.*;
- e. Does not include the performance of routine mental, manual, mechanical or physical work. *Id.*;
- f. Advanced knowledge cannot be attained at the high school level. *Id.*;
- g. Must be the type of knowledge customarily acquired through a prolonged course of specialized intellectual instruction and study. 29 C.F.R. § 541.301(a)(3); and
- h. Specialized academic training must be a standard prerequisite for entrance into the profession. “[W]here most or all employees in a particular job lack advanced education and instruction, the exemption is inapplicable.” *See Young v. Cooper Cameron Corp.*, 586 F.3d 201, 206 (2d Cir. 2009); *see also Solis v. Washington*, 656 F.3d at 1079 (social worker positions did not qualify under FLSA’s learned professional exemption); *Radtke v. Lifecare Mgmt. Partners*, 795 F.3d 159, 163 (D.C. Cir. 2015).

C. Creative Professionals

Work must be in a recognized field of artistic or creative endeavor, which includes such fields as music, writing, acting and the graphic arts; 29 C.F.R. § 302(b).

III. EXECUTIVE EXEMPTION

A. Elements

1. Employee must be paid on a salary basis of at least \$455 per week;
2. Have his/her primary duty managing the enterprise in which the employee is employed, or a customarily recognized department or subdivision thereof;
3. Customarily and regularly direct the work of two or more other employees; and
4. Have the authority to hire and fire other employees, or make suggestions and recommendations that are given particular weight as to hiring, firing, advancement, promotion, or any other change of status of other employees. 29 C.F.R. § 541.100(a)(2), (a)(3) and (a)(4).

B. Management Duties

1. Include but are not limited to: interviewing, selecting and training employees; setting and adjusting employees' rates of pay and hours of work; maintaining production or sales records for use in supervision and control; appraising employees' productivity and efficiency for purposes of recommending promotions or other changes to employee's status; handling employee complaints and grievances; imposing discipline; planning work; determining techniques to be used; apportioning work amongst employees; determining materials, supplies, machinery, or tools to be used or merchandise to be purchased; controlling the flow or distribution of materials, merchandise or supplies; providing for safety of employees or the employer's property; budget planning and control; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

C. Primary Duties

1. Percentage of time is not dispositive.
2. Relevant factors are:
 - a. Relative importance of exempt duties vs. non-exempt duties;
 - b. The amount of time spent performing exempt work;

- c. Employee's relative freedom from direct supervision; and
- d. Relationship between employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. 29 C.F.R. § 541.700(a).

D. Customarily and Regularly Direct the Work of Two or More Other Employees

- 1. Customarily and Regularly - Must be more than occasional. 29 C.F.R. § 541.701
- 2. Two or more employees - Must be two full time employees (or equivalent). 29 C.F.R. § 104(a).

E. Authority with Respect to Personnel Matters

- 1. Factors to be considered include:
 - a. Whether it is part of employee's job duties to make suggestions and recommendations;
 - b. Frequency with which recommendations are made or requested; and
 - c. Frequency with which the recommendations are relied upon. 29 C.F.R. § 541.105.

F. Key Cases

- 1. *Ramos v. Balder Specialty Funds*, 687 F.3d 554, 559 (2d Cir. 2012) – “Team Leaders” at food warehouse qualify for executive exemption.
- 2. *Marzuq v. Cadete Enterprises, Inc.*, 807 F.3d 431 (1st Cir. 2015) – genuine issue of fact regarding whether assistant store managers at Dunkin’ Donuts were exempt.
- 3. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008) – Here, the grocery store managers were misclassified as exempt employees because they spent little to no time performing managerial duties. In addition, the employees had to report to district managers, who gave them permission to implement any sort of managerial decision.
- 4. *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1114 (9th Cir. 2001) – Managers of recreational vehicle (RV) park were covered by the executive exemption because they spent the majority of their time conducting managerial activities, which included: interviewing, selecting and training employees; setting hours for and planning and directing work; evaluating and disciplining employees; and maintaining the safety of the employees and the park.

5. *Murray v. Stuckey's, Inc.*, 50 F.3d 564, 570 (8th Cir. 1995) – Managers of roadside gas station and convenience stores were covered by the executive exemption.
6. *West v. Anne Arundel Cty., Md.*, 137 F.3d 752, 763 (4th Cir. 1998) – Emergency Medical Service (EMS) captains of a fire department were covered by the executive exemption because they were paid on salary basis, managed and directed operations of all shifts of EMS company, implemented training programs, maintained personnel records, and supervised work of two or more employees.

IV. ADMINISTRATIVE EXEMPTION

A. Elements

1. Employee must have a primary duty of performing “office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and
2. Must have a primary duty that “includes the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a)(2) and (a)(3).

B. Primary Duty Must be “Office or Non-Manual”

1. Employer must prove that the employee performed office or non-manual work as his primary duty. 29 C.F.R. § 541.200(a).
2. Exemption “do[es] not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy.” 29 C.F.R. § 541.3(a); see *Mendoza v. Disc. C.V. Joint Rack & Pinion Rebuilding, Inc.*, 101 F. Supp. 3d 1282, 1292 (S.D. Fla. 2015) (assembling and rebuilding CV axles was “routine” and “manual work.”); *Haas v. Verizon New York, Inc.*, No. 13-CV-8130 RA, 2015 WL 5785023, at *5 (S.D.N.Y. Sept. 30, 2015) (Verizon’s technicians, who “install the services Verizon provides,” perform non-exempt duties.”); *Canela-Rodriguez v. Milbank Real Estate*, No. 09 CIV 6588 JSR, 2010 WL 3701309, at *3 (S.D.N.Y. Sept. 20, 2010) (exemption did not apply to employee “whose primary duties were maintenance and repair work.”); *Bath v. Woodland Meadows*, No. CIV.A.08CV13379, 2009 WL 3270532, at *4 (E.D. Mich. Oct. 5, 2009) (plant operator who “did much if not all of the routine maintenance himself,” and “regularly monitored and calibrated gas chromatographs” was not exempt.)

C. “Directly Related to Management or General Business Operations”

1. Running the business vs. carrying out day-to-day job duties.
2. Production work vs. administrative tasks or the “administrative/production dichotomy.” *See* 29 C.F.R. § 541.201.

D. Discretion and Independent Judgment

1. Must analyze the type of work performed and the importance of the work.
2. Does the employee have the authority to make an “independent choice, free from immediate direction of supervision”? *See* 29 C.F.R. 541.202(c).
3. “Matters of Significance” refers to the “level of importance or consequence” of the work performed by the employee. *Id.*
4. Factors to consider include but are not limited to:
 - a. Whether the employee has the authority to interpret, formulate or implement management policies or operations;
 - b. Whether the employee carries out major assignments in conducting the operations of the business;
 - c. Whether the employee has the power to bind the company regarding matters which have a substantial financial impact;
 - d. Whether the employee is engaged in planning for the business;
 - e. Whether the employee investigates and resolves matters of importance on behalf of management; and
 - f. Whether the employee is representing the company in handling grievances and complaints.

E. Key Cases

1. *Calderon v. GEICO Gen. Ins., Co.*, 809 F.3d 111 (4th Cir. Dec. 23, 2015) – Special investigators whose primary job duty was to conduct factual investigations and report the results found non-exempt under the administrative exemption.
2. *Reiseck v. Universal Communications of Miami*, 591 F.3d 101 (2d Cir. 2010) – Summary judgment for employer reversed as employee’s primary

duty was making sales which are not covered by the administrative exemption.

3. *Davis v. J.P. Morgan Chase*, 587 F.3d 529 (2d Cir. 2009) – Summary judgment for employer reversed as loan underwriters were not covered by administrative exemption due to the fact that they were involved in “production.” *But see Henry v. Quicken Loan, Inc.*, 698 F.3d 897 (6th Cir. 2012) (mortgage loan “consultants” are exempt.)
4. *In Re Novartis Wage and Hour Litigation*, 611 F.3d 141, 156 (2d Cir. 2010) *abrogated on other grounds, Christopher v. Smithkline Beechem Corp.*, 1325 Ct. 2156 (2012) – Sales representatives did not qualify for administration exemption.
5. *Renfro v. Indiana Michigan Power Co.*, 370 F.3d 512, 512 (6th Cir. 2004) – Work planners employed by nuclear power plant were covered by the administrative exemption because they were paid on a salary basis, performed nonmanual work directly related to general business operations, they exercised discretion and independent judgment.
6. *Guerrero v. J.W. Hutton, Inc.*, 458 F.3d 830 (8th Cir. 2006) – A subrogation analyst for an insurance company was an exempt administrative employee because her work involved office work relating to employer’s general business operations and she exercised discretion and judgment.
7. *Donovan v. United Video, Inc.*, 725 F.2d 577 (10th Cir. 1984) – Microwave system engineers did not fall within the administrative exemption because their responsibilities, which consisted of performing maintenance inspections, were primarily manual in nature.
8. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 332 (5th Cir. 2000) – Affirmed summary judgment for employer that an office manager for an automobile dealership qualified for the administrative exemption because her primary duties were directly related to management and general business operations. She was responsible for preparing all payrolls and quarterly returns, reports, financial statements, and supervised four office employees.
9. *Smith v. Gov’t Employees Ins. Co.*, 590 F.3d 886, 893 (D.C. Cir. 2010) – Claim adjusters qualified for the administrative exception and exercised sufficient discretion and independent judgment, even though they heavily relied on the computer systems to aid them in complying with standards.

V. WAGE AND HOUR ISSUE SPOTTING - “TIPPED” EMPLOYEES UNDER THE FLSA

29 U.S.C. § 206(a), sets forth the minimum wage (presently \$7.25 per hour) that employers must pay to their covered employees. 29 U.S.C. § 203(m) provides that where an employer satisfies the statutory requirements, an employee’s wage can also include “tips” in specified, limited circumstances.

An employer may pay any “tipped employee” an hourly rate less than the federal minimum wage by crediting a portion of the actual amount of tips received by the employee toward the required hourly minimum wage. The difference between the full statutory minimum wage and the reduced wage paid to tipped employees is called the “tip credit.”

If an employer is claiming the tip credit, it bears the burden of satisfying several specific prerequisites. *See, e.g., Reich v. Chez Robert, Inc.*, 28 F.3d 401, 403 (3d Cir.1994); *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 680-81 (D. Md. 2012); *Fast v. Applebee’s Int’l, Inc.*, No. 06-4146, 2010 WL 816639, at *7 (W.D. Mo. Mar. 4, 2010); *Bernal v. Vankar Enterp., Inc.*, 579 F. Supp. 2d 804, 808 (W.D. Tex. 2008). Unless the employer can prove that it is entitled to claim a tip credit against its minimum wage obligations, it is required to pay its employees the full statutory minimum wage. *See id.*

A. Tip Credited Minimum Wage

1. Only applies to tipped employees

a. “Tipped employee” and “Tips”

A “tipped employee” is “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. § 203(t). The phrase “‘customarily and regularly’ signifies a frequency which must be greater than occasional, but which may be less than constant.” 29 C.F.R. § 531.57.

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service. 29 C.F.R. § 531.52. Whether a tip is to be given, and its amount, are matters determined solely by the customer. *Id.* A charge imposed by an employer, such as a “service fee” or “banquet charge,” is not a tip. 29 C.F.R. § 531.55(a).

b. Types of employees who receive tips

An employee who receives tips may also spend part of his or her time doing work for which no tips are received. In the case of restaurant workers, for servers who perform “general preparation work,” if such work exceeds 20% of her time, no tip credit may be taken for the time spent in such duties. *See* 29 C.F.R. § 516.28(a) (employer must maintain records that show and, for those employees, how many hours in each workday are worked in occupations in which the employee receives tips and how many are worked in any occupation in which the employee does not receive tips); *see also, Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872 (8th Cir. 2011), *pet. reh. denied* (July 6, 2011); *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360 (S.D. Fla. 2009).

2. Employers must adhere to specific rules in order to lawfully claim a tip credit

An employer who claims a tip credit must pay at least \$2.13 out of its own pocket to the employee, and can credit all tips (up to a maximum of \$5.12 per hour) received by the employee, whether directly from customers or through a legitimate tip pool – toward the \$7.25 FLSA minimum wage. Thus, if the employee receives at least \$5.12 in tips per hour worked, the employer is deemed to have paid the employee the minimum wage. If the employee does not receive at least \$5.12 per hour in tips, then the employer must pay an additional amount, on top of the \$2.13, out of its own pocket, in order to raise the employee's compensation up to \$7.25 per hour.

An employer cannot properly take the tip credit unless:

- the employee “has been informed by the employer of the provisions of [29 U.S.C. § 203(m)]”; and
- “all tips received by [the] employee have been retained by the employee,” except that this requirement does not “prohibit the pooling of tips among employees who customarily and regularly receive tips.”

a. Tipped employees must be informed

The employer must inform *each* tipped employee before it uses the tip credit of *each* aspect of the tip credit provisions, specifically:

- the amount of the cash wage that is to be paid to the tipped employee by the employer;
- the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of tips actually received by the employee;
- that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- that the tip credit shall not apply to any employee who has not been informed of these requirements.

See 29 C.F.R. § 531.59(b).

The employer has the burden of proving that it has satisfied this notice requirement. *See, e.g., Reich v. Chez Robert, Inc.*, 28 F.3d 401, 403 (3rd Cir.1994); *Kilgore v. Outback Steakhouse*

of Fla., Inc., 160 F.3d 294, 299 (6th Cir.1998); *Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1322 (1st Cir.1992).

b. Employees included in tip pool

The statutory restrictions on who may be included in a tip pool apply only where the tip sharing is required by the employer. *See Roussell v. Brinker Int'l., Inc.*, 05 Civ. 3733, 2008 WL 2714079, at *18 (S.D. Tex. July 9, 2008) (discussion of mandatory versus voluntary tip sharing).

The standard for determining whether a tip pool is voluntary is an objective one focused on the behavior of the employer. *See Roussell*, 2008 WL 2714079, at *18 (finding that if “the employer’s actions ‘might well’ dissuade a reasonable employee from not sharing tips with a [another position],” then the employee’s tip sharing is not voluntary); *see, e.g., Zhao v. Benihana, Inc.*, No. 01 Civ. 1297, 2001 WL 845000 (S.D.N.Y. May 7, 2001).

The FLSA does not prohibit employers from requiring tipped employees to share their tips with certain other employees through a tip pool, so long as the specific statutory requirements are satisfied. 29 U.S.C. § 203(m). However, “[i]f tipped employees are required to participate in a tip pool with other employees who do not customarily receive tips, then the tip pool is invalid and the employer is not permitted to take a ‘tip credit.’” *Gionfriddo v. Jason Zink, LLC*, 769 F. Supp. 2d 880 (D. Md. 2011) (citations omitted).

3. Special recordkeeping requirements for employers claiming the tip credit

29 C.F.R. § 516.28(a) requires employers claiming the tip credit must maintain and preserve the following records (in addition to the records required of all employers in 29 C.F.R. § 516.2(a)):

- A notation identifying each employee whose wage is determined in part by tips;
- The weekly or monthly amount reported by the employee, to the employer, of tips received;
- The amount by which the wages of each tipped employee have been deemed to have been increased by tips as determined by the employer;
- Hours worked each workday in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and
- Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

B. Crediting Board, Lodging and “Other Facilities” and its Relationship to the Minimum Wage

Wages paid to employees can include “the reasonable cost, as determined by the [Wage and Hour] Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees” 29 U.S.C. § 203(m).

1. Must be for the employee’s benefit

The cost of furnishing facilities that are “primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.” 29 C.F.R. § 531.3(d)(1). Examples of items determined to be for the employer’s benefit include tools of the trade and other materials and services incidental to carrying on the employer’s business; the cost of purchasing or renting uniforms (as well as their laundering), where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workers’ compensations laws, or similar federal, state, or local law. 29 C.F.R. §§ 531.3(d)(2), 531.32(c).

2. Strict recordkeeping requirements

An employer who treats board, lodging, or other facilities as part of any employee’s wage must “maintain and preserve records substantiating the cost of furnishing each class of facility.” These records must include “itemized accounts showing the nature and amount of any expenditure entering into the computation of reasonable cost.” 29 C.F.R. § 516.27(a)(1). Without such records, an employer may not claim a wage credit. *See, e.g., Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 473-76 (11th Cir. 1982).

C. Cost of Purchasing, Renting, and/or Cleaning Uniforms and its Relationship to the Minimum Wage

“29 C.F.R. § 531.3(d)(2), provides that, “the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform,” are considered to be “primarily for the benefit of convenience of the employer.” The cost of cleaning and the uniform is the employer’s cost of doing business that may not be imposed on the employees if doing so would reduce their wages below minimum wage. *See* 29 C.F.R. §§ 531.3(d)(2), 531.32(c), 531.35.

#NELA2016 HYPOTHETICALS

HYP0 No. 1

A group of construction laborers and truck drivers are hired by an oil services company that is helping to build outbuildings for sites. Both truck drivers and laborers are instructed to report to the company yard at 8 a.m. each morning to load in materials, before the truck drivers take everyone out to the various job sites by loading them on any seats in the trucks or on the trucks. Laborers who do not fit take their own cars or carpool to the sites. The loading usually takes an hour, during which the truck drivers are free to do as they please, although they sometimes move trucks or lend a hand with materials. The drive to the sites take between 15 and 45 minutes, then most of the truck drivers return to the yard, where they generally park until they do another materials run at lunch. Most drivers also do materials runs between 1-5. Some drivers remain at the sites to ferry goods between sites, they have many breaks during the day, most of them less than 15 minutes. Drivers usually finish when they do a last run at 5, but sometimes they are called on to do more runs and they can go as late as 10 p.m. Most drivers head straight home from the site and park the truck at home rather than go to the yard. Some go to the yard. The company says the day ends when they pull away from the last site of the day, regardless of where they park the truck.

The drivers who remain at sites are paid a flat rate of \$100 a day, with the company saying all the breaks are not work time. The remainder of the drivers are paid \$10 an hour, but are not paid for the hour of load time for the wait time between first run and the afternoon runs.

The laborers are divided into framing, finish, pipes and electrical pull crews. These crews are paid by the linear feet of materials they install as a crew. On a good day, they earn about \$150. On a bad day, where the materials are late, defective or the outbuilding is tricky to build, they make about \$75 a day. The company says that they always average more than minimum wage across a week, but it does not include an often interrupted half hour lunch or two 15 minute breaks, nor does it include the drive time to the sites. End of day is when they stop working on the buildings at the site. For laborers, the work day start at 8 and never end before 5 at the sites and can go as late as 9:30 at the sites. On days where they day goes past 8 p.m., the company informally gives them a \$10 dollar "bonus." The company says this counts as wages.

- Claims???

HYP0 No. 2

Ashley calls your office with a potential wrongful termination claim after she was fired as an assistant manager at one of Boris Burgers of Boston's restaurants. During your call with Ashley, you ask questions to determine whether she has a claim under a variety of federal and state anti-discrimination statutes. Unfortunately, you realize that she does not have a claim for her termination due to your state's cold and strict interpretation of at-will employment. However, after attending your most recent NELA conference, you decide to ask Ashley some additional questions to see if you might be able to dip your foot in the FLSA pool.

During the call, Ashley states that she worked for Boris Burgers for 3 years, and she was assigned to the smallest Boris Burgers location, consisting of only 5 workers, including herself and the manager. During that time she was paid \$700 per week. Ashley mentions that she

worked 50 hours a week. You ask if she received overtime, and Ashley responds saying, “no, I was paid a salary so I didn’t get overtime.” You ask Ashley about her responsibilities and she said, “my number one job was customer service. My job was to ensure that customers got their food on-time, were satisfied with the quality of the food, and that the restaurant was clean.”

- Claims???

Timmy also works as a server for Boris Burgers. He is paid a reduced minimum wage for all hours worked because he receives tips. Boris Burgers does not keep track of the amount of tips Timmy receives, but they do require that he give 2% of his tips to the Boris Burgers food bussers, and “recommend” that he give 1% of his tips to the food expeditors. The bussers assist the servers with delivering food to the table and cleaning the tables. The expeditors garnish plates, confirm that special requests for food orders are complied with, and pull food from the kitchen and organize them for Timmy and the other servers.

- Claims???

Timmy spends the majority of his time serving food to customers, but he also tells you that he also has to stock and restock ice; stack chairs; clean booths, tables, chairs menus, lighting fixtures, and windows; refill salt and pepper shakers; sorts silverware; rolls napkins; and cleans the beverage station.

- Claims???

Olaf also works for Boris Burgers as a server. He is not permitted to punch in until his first table is seated. He is also required to punch out once his last table pays the check. Even after his last table leaves, Olaf helps out by preparing silverware and tables for the next shift; refills ketchup and the special sauce which Boris Burgers’ customers love. He is not paid for this work, but he was told by Maggie manager that “because he makes much more than the minimum wage in tips, he shouldn’t complain.”

- Claims???

Ulysses also works for Boris Burgers as a server. He is paid the tipped minimum wage for all hours worked. Ulysses, like all of Boris Burgers workers, must wear a Boris Burgers uniform. Ulysses was required to buy 4 of them before his first day of work for Boris Burgers. During the course of his employment with Boris Burgers, Ulysses is required to clean his uniform. Ulysses asked Maggie manager about whether he will be reimbursed for this expense, and Maggie said “No, if you want to work here you must look the part.”

- Claims???

HYP0 No. 3

Sujatha works as an Operations Manager (salaried, exempt) in a warehouse for FloorMart, where she oversees hourly workers (Loaders) who load and unload inventory, and clean and organize the warehouse. She often works on the floor alongside the Loaders, helping them load, unload, clean, and organize. The rest of the time, she implements assignments received on her tablet from FloorMart's Computer Operations Program (COP). COP sets her schedule each day and sends detailed alerts throughout the day to tell Sujatha to shift Loaders' schedules and assignments, check inventory, confirm that Loaders participate in required trainings, ensure that Loaders pick up multiple boxes and move quickly, alert the mechanic team to needed repairs, etc.

Sujatha is responsible for interviewing Loader applicants using a strict, detailed script listing the questions to be asked and providing a numerical rating scale. She provides recommendations to management about whom to hire, and those recommendations are usually followed. She also provides feedback about Loaders to management, and that feedback forms the core of the Loaders' performance evaluations and, in turn, chances for promotions and raises.

Sujatha earns about \$70k per year. Loaders regularly work overtime, so that their annual compensation is approximately \$60-65k. Sujatha's supervisor in the warehouse, the Mega Operations Manager (MOM), earns about \$130k and works in the office set apart from the warehouse floor. The MOM makes final decisions about hiring, firing, and promotions. The MOM sometimes visits the floor to walk through tasks with Sujatha and provide feedback.

Sujatha works approximately 50 hours per week. FloorMart has a timekeeping system that Operations Managers use, by entering time at the end of each week. Sujatha's MOM encourages Operations Managers to put 40 hours each week because "it doesn't really matter; FloorMart doesn't use this stuff for anything." Sujatha doesn't feel completely comfortable with that, so she puts 42-43 hours in the system. Sujatha has complained to her MOM about misclassification and long hours a few times. Once, her MOM said "oh honey, you're not the first – we even had some government dweeb snooping around here once, but management convinced her to go away, so this is the way it is."

Sujatha wants to know (1) if she has a misclassification claim, and (2) what her expected damages will be if she prevails.

- Claims???

Wage & Hour: Issue Spotting

Todd Jackson,
Troy L. Kessler
Jahan Sagafi &
Rachhana T. Srey



#NELA16

The Overall Legal

- FLSA cases for wages generally involve two questions
 - Are you entitled to overtime at all?
 - Misclassification cases involve determining whether an exemption to the general rule that overtime is owed is appropriate for this employee or group of employees.
 - What payment are you entitled to?
 - These cases involve inquiries into whether the employer paid for all hours worked at the legally required level.
 - These are often either off the clock cases or appropriate rate cases.

Hypothetical No. 1

...

Construction Workers



#NELA16

Hypo I: Construction Workers

Drivers & Laborers

- Drivers & Laborers instructed to **report to yard at 8 a.m.** to load materials into trucks = **1 hour**
- Laborers who cannot fit in trucks, take their own cars or carpool to sites
- Drive from yard to site = **15-45 minutes**

Hypo I: Construction Workers

- Drivers:
 - Most return to yard & park until material runs at lunch
 - Most do **material runs between 1 p.m. and 5 p.m.**
 - Some drivers remain at sites all day to take goods between sites, with many breaks, most of them < 15 minutes;
 - Last run = 5 p.m. **but sometimes** do runs until **10 p.m.**
 - **Most drivers go home directly from site & park truck at home**
 - **Some drivers go to the yard & park truck at yard**
- Employer claims **day ends when you leave site, regardless of where truck is parked**

Hypo I: Construction Workers

- Laborers:
 - Divided into 4 crews: framing, finish, pipes, and electrical pull
 - **Paid per linear feet of materials installed** as a crew
 - Good day = \$150/day
 - Bad day = \$75/day
 - End of Day = when work stops on the building at the site – never before 5 p.m. and as late as 9:30 p.m. at the sites.
- Employer claims Laborers always average more than the minimum wage across a week, but pay does not include:
 - The **often interrupted** ½ hour lunch;
 - Two 15 min. breaks; and
 - Drive time to the sites
- If laborers end work at site after 8 p.m., they are given an informal \$10 **“bonus”**
 - Employer claims this **“bonus” counts as wages**

Hypothetical No. 2

...

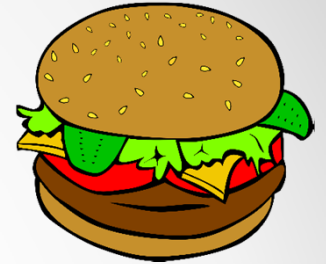
Restaurant Workers



#NELA16

Hypo 2: Restaurant Workers

Ashley – Assistant Manager



- Ashley is an **assistant manager** at the **chain**: Boris Burgers of Boston
- Worked for **3 years** at one Boris Burgers location with **only 5 workers**
- Paid **\$700 per week** and worked **50 hours** a week
- “I was **paid a salary** so I **didn’t get overtime**.”
- **Responsibilities** as assistant manager: customer service, ensure customers got their food on-time, satisfied with food quality, and that the restaurant was clean

Hypo 2: Restaurant Workers

Ashley – Assistant Manager

- Employed for the last 3 years
- Chain employer



- **FLSA, 29 U.S.C. § 255(a)** – 2 year SOL, unless “willful” violations, then 3 year SOL applies
- **FLSA, 29 U.S.C. § 203(s)(1)(A)(ii)** – “Enterprise Coverage” - Entity must have \$500,000 or more in annual gross volume sales made or business done.
- **FLSA, 29 U.S.C. § 203(r)** – Single common enterprise established if:
 1. Related activities;
 2. Through unified operation, or under common control; **AND**
 3. For a common business purpose.

Hypo 2: Restaurant Workers

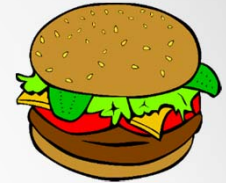
Ashley – Assistant Manager



- Responsibilities
 - customer service
 - ensure customers got their food on-time
 - ensure customers satisfied with food quality
 - clean the restaurant
- **Executive Exemption:**
 1. Salary not less than \$455 per week;
 2. *Primary Duty* must be managing the enterprise, or managing a customarily recognized dept. of the enterprise;
 3. *Customarily and regularly* direct work of at least 2 or more other f/t employees;
AND
 4. *Authority* to hire/fire other employees, or recommendations must be given particular weight.

Hypo 2: Restaurant Workers

Ashley – Assistant Manager



- \$700/week salary
- FLSA requires most employees be paid on an hourly basis, and receive overtime at 1.5 the regular rate for all hours > 40.

- 50 hours/week

Calculation of Overtime Owed

- Salary ÷ 40 hours worked = **Regular Hourly Rate**
 - $700/40 = \$17.50/\text{hour}$
- (OT Hours Worked) * (Regular Hourly Rate) = **Unpaid OT Owed Per Week**
 - $10 * (17.50 * 1.5) = \$252.50/\text{week}$

Hypo 2: Restaurant Workers

Timmy – Server

- Timmy is a **server** and paid the **reduced minimum wage** and **receives tips**
- Boris Burgers **does not record tips**
- Timmy required to give 2% of his tips to the food bussers, and “recommended” to give 1% of tips to food expeditors



Hypo 2: Restaurant Workers

Timmy – Server / Tip Credit

- Timmy paid **reduced minimum wage** and **receives tips**
- **Tip Credit** – FLSA permits employer to pay employees less than the minimum wage, as long as the employee receives enough in tips to make up the difference. The “credit” is the amount the employer does not have to pay. (**Exceptions**: CA, MN, OR)



Hypo 2: Restaurant Workers

Timmy – Server / Tip Credit

- Requirements **before** employer may use a **tip credit**:
 1. Tipped employee must be informed of tip credit provisions;
 2. All tips received by the tipped employee must be retained by the employee except for valid tip pooling arrangements to employees who customarily and regularly receive tips;
 3. The tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
 4. The amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13 per hour; AND
 5. The additional amount claimed by the employer as a tip credit, which cannot exceed \$5.12 (difference b/w minimum required cash wage of \$2.13 and current Federal Minimum Wage of \$7.25)

Hypo 2: Restaurant Workers

Timmy – Server / Tip Credit

- Boris Burgers **does not record tips**
- **Recordkeeping Requirements:** Employers electing to use the tip credit under the FLSA must be able to show that the tipped employees received at least the minimum wage when wages and tip credit amounts are combined.



Hypo 2: Restaurant Workers

Timmy – Server / Tip Pooling

- Timmy required to give 2% of his tips to the food bussers, and “recommended” to give 1% of tips to food expeditors



- **Tipped Employees** – those who *customarily and regularly* receive more than \$30/month in tips
- **Bussers/Bartenders** = typically create a valid tip pool
 - **Result** = No minimum wage violation
- **Expeditors/dishwashers/cooks** = may not be included in a tip pool because they **do not** customarily and regularly receive tips.
 - **Result** = FLSA minimum wage violation, and Timmy is entitled to his full minimum wage for all hours worked while participating in improper tip pool

Hypo 2: Restaurant Workers

Timmy – Server / Side Work

- Timmy is a **server** and paid the **reduced minimum wage**
- Timmy spends **majority of time** serving food, **but** also:
 - Stocks and restocks ice
 - Stacks chairs
 - Cleans booths, tables, chairs, menus, lighting fixtures, and windows
 - Refills salt/pepper shakers
 - Sorts silverware
 - Rolls napkins
 - Cleans beverage station



Hypo 2: Restaurant Workers

Timmy – Server / Side Work

- “Side work” or “Dual Jobs”
- If tipped employees spend a substantial amount of time (in **excess of 20%** in the workweek) performing “related duties” or “side work,” the employer may not take a tip credit
 - **Result** - Timmy owed regular minimum wage for **ALL** hours worked.

Hypo 2: Restaurant Workers

Olaf – Off-the-Clock



- Olaf is a **server** and **cannot punch in until** his **1st table is seated**.
- Olaf is **required to punch out** once his **last table pays the check**.
- Olaf **helps after his last table leaves** by preparing silverware and tables for the next shift. He is **not paid for this work**.
- Manager advises “because he makes much more than the minimum wage in tips, he shouldn’t complaint”

Hypo 2: Restaurant Workers

Olaf – Off-the-Clock

- Off-the-Clock Work
 - Not punching in until 1st table seated
 - Punching out after last table pays the check
 - Cleaning after punching-out

29 U.S.C. §§ 206(a), 207(a) – hourly employees must be compensated for all hours worked, and employers are prohibited from requiring them to perform uncompensated, or “off-the-clock” work.

Hypo 2: Restaurant Workers

Ulysses – Uniform

- Ulysses is a **server** and **paid tipped minimum wage**.
- Ulysses **must wear** a Boris Burger **uniform**.
- Ulysses is **required to buy 4 uniforms**.
- Ulysses is **required to clean his uniform**.
- Manager advises “If you want to work here, you must look the part.”



Hypo 2: Restaurant Workers

Ulysses – Uniform

- Ulysses is paid the tipped minimum wage and must **buy & clean** his uniform



- 29 C.F.R. § 531.3(d)(2), (c), 531.35**
Employers must provide and launder uniforms if:
 - The uniform is required;
AND
 - The burden on the employee would reduce his wages below the minimum wage.

Hypothetical No. 3

...

Misclassified Workers

Hypo 3: Misclassified Workers

Sujatha – Operations Manager

- Sujatha is an **operations manager** and is **paid a salary**
- Sujatha duties:
 - works alongside Loaders;
 - loads, unloads, cleans, and organizes with the Loaders
 - implements assignments received on her tablet from Computer Operations Program (COP)
- **COP sets Sujatha's schedule, sends detailed alerts re Loaders:** schedules, assignments, inventory, participation in training, ensure completing tasks, moving quickly, etc.

Hypo 3: Misclassified Workers

Sujatha – Operations Manager

- Sujatha's responsibilities:
 - Interviewing Loaders using **strict, detailed script, listing questions and providing numerical rating scale;**
 - Provides **recommendations** to management about whom to hire/fire, and her recommendations are **usually followed;** and
 - **Provides feedback** on Loaders to management, which **forms the core** of Loader's performance evaluations & chances for promotions/raises.

Hypo 3: Misclassified Workers

Sujatha – Operations Manager

- Sujatha's salary = \$70k/year
- Regularly works overtime so reach 50
- Interviewing Loaders using **strict, detailed script, listing questions and providing numerical rating scale;**
 - Provides **recommendations** to management about whom to hire/fire, and her recommendations are **usually followed;** and
 - **Provides feedback** on Loaders to management, which **forms the core** of Loader's performance evaluations & chances for promotions/raises.

Hypo 3: Misclassified Workers

Sujatha – Operations Manager

- Sujatha's salary is \$70k/year
- Loaders earn \$60-65k/year with overtime
- Sujatha's supervisor ("MOM") earns \$130k/year
 - Office set apart from warehouse
 - Makes final decision about hiring, firing, and promotions
 - Sometimes visits Sujatha in the warehouse & provides feedback

Hypo 3: Misclassified Workers

Sujatha – Operations Manager

- Sujatha works approximately 50 hours/week
- Sujatha records her time worked at the end of each week
- Sujatha's MOM encourages operations managers to enter 40 hours each week because "it doesn't really matter; FloorMart doesn't use this stuff for anything"
- Sujatha records 42-43 hours/week in the system
- Sujatha has complained to MOM re misclassification and long hours.